Filed 9/19/06 P. v. Pruitt CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. TRACEY PRUITT, Defendant and Appellant.	B183290 (Los Angeles County Super. Ct. No. BA275089)

APPEAL from a judgment of the Superior Court of Los Angeles County. Carol H. Rehm, Jr., Judge. Affirmed in part, vacated in part and remanded with directions.

Kathleen M. Redmond, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant, Tracey Pruitt, of one count of possession of cocaine base for sale.[1] Attached to this count were allegations appellant had suffered prior illegal drug related convictions.[2] The jury also convicted appellant of the misdemeanor offense of unlawfully and falsely identifying herself to a police officer.[3] She appeals her convictions, claiming the trial court abused its discretion in failing to grant a continuance to secure the presence of a material defense witness and the court's instruction regarding the offense of falsely identifying oneself to a police officer was erroneous, confusing and prejudicial. Finally, appellant argues the court's order requiring her to reimburse the county $6,856.45 in attorney fees must be reversed because the court imposed its order without notice, hearing or findings and thus in violation of the statutory requirements for assessing her the cost of court-appointed legal representation. We find, and the People agree, appellant's latter contention has merit. Accordingly, we will vacate the order assessing attorney fees and remand to the trial court to conduct a noticed hearing on appellant's current ability to pay such fees consistent with the statutory mandates. We affirm the judgment in all other respects.

FACTS AND PROCEEDINGS BELOW

A team from the narcotics division of the Los Angeles Police Department conducted an investigation of the drug activity on Fifth and Main Streets in downtown Los Angeles. Detectives Flynn and Feldtz observed the area using high-powered binoculars from their undisclosed observation point two to four floors up and from approximately 100 feet away. Other officers in unmarked "chase" cars were nearby. The officers and detectives communicated with each other using walkie-talkies.

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[1] Health and Safety Code section 11352, subdivision (a).

[2] Health and Safety Code section 11370.2, subdivision (a).

[3] Penal Code section 148.9, subdivision (a). All further statutory references are to the Penal Code unless otherwise noted.

Around 5:00 in the evening on November 29, 2004 Detectives Flynn and Feldtz saw appellant standing in front of King's Market on the corner of Fifth and Main Streets. It was dusk but the area was illuminated somewhat by the light emanating from inside King's Market and by the outdoor street lamps. The detectives watched appellant as several persons gathered around her, holding out money.

One of these persons, later identified as Elena Palkowitz, was standing near appellant, straddling a bicycle. Through their high powered binoculars, the officers observed Palkowitz hand appellant money. Appellant took the money. Appellant selected three off-white colored rocks from a baggie and handed them to Palkowitz. Palkowitz had on black gloves. Contrasted against her black gloves the officers could easily discern the three white colored rocks as Palkowitz examined them for a second. The detectives watched as Palkowitz placed the rocks inside of her right glove. Palkowitz then bicycled off, heading north on Main Street.

Detective Flynn radioed a chase team regarding the buy he had just witnessed. Detective Flynn gave a physical description of Palkowitz, told the officers the direction she was then heading and stated the presumed rocks of cocaine were inside her right hand glove.

Detective Flynn continued to observe appellant as she made six to eight more sales while Detective Feldtz monitored Palkowitz's and the chase team's actions. The chase team arrested Palkowitz a block or so away near Main and Fourth Streets. The arresting officers confirmed by radio when they retrieved three rocks of what the parties later stipulated was cocaine base from Palkowitz's right glove.

Persons standing on the corner of Fifth and Main Streets saw the officers arresting Palkowitz. A man who had been standing nearby in front of King's Market approached appellant. They faced each other and conversed for a few moments. Appellant had her back to Detective Flynn so he could not determine the precise nature of appellant's interaction with this unidentified man. A moment later the man walked away southbound on Fifth Street. Appellant headed in another direction but then changed course and started walking back toward the corner of Fifth and Main Streets.

When he received confirmation Palkowitz in fact had three rocks of cocaine base in her right glove Detective Flynn ordered a second chase team to arrest appellant. As officers approached to grab appellant by her arms she started screaming, "No, no no." The officers handcuffed appellant. According to the arresting officers, appellant "freaked out" and attempted to climb onto the hood of the officers' car.

Appellant told the officers her name was "Stacey Zapps." She spelled her last name for the officer's report and gave an inaccurate birth date of March 17, 1974. Officers found no drugs on appellant's person. On the other hand, appellant had a total of $205 in her clothing: $105 in her left jacket pocket and the balance in her left pant's pocket and left sock. The $205 found on appellant's person included 35 $1 bills, 15 $5 bills and a few $10 and $20 bills. The officers testified $5 purchases represented the average transaction in this Skid Row area of downtown Los Angeles.

The evidence at trial showed appellant's true name was Tracey Pruitt and not Stacey Zapps. This was shown by a DMV printout and a Nix's check cashing card both in the name of Tracey Pruitt.

An information charged appellant with one count of illegally selling cocaine base.[4] Regarding this count the information alleged appellant had suffered five prior illegal drug related convictions.[5] The information also charged appellant with unlawfully and falsely identifying herself to a police officer.[6]

The jury convicted appellant of both counts. Appellant waived trial on the prior conviction allegations and admitted two of the most recent prior convictions charged. The court sentenced appellant to a total term of 10 years in prison. The court imposed related fines and penalty assessments and made other orders. In one such order the trial court directed appellant to reimburse the county $6,856.45 in attorney fees.

Appellant appeals from the judgment of conviction.

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[4] Health and Safety Code section 11352, subdivision (a).

[5] Health and Safety Code section 11370.2, subdivision (a).

[6] Section 148.9, subdivision (a).

DISCUSSION

I. APPELLANT HAS FAILED TO ESTABLISH THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HER REQUEST FOR A CONTINUANCE IN ORDER TO SECURE THE PRESENCE OF A DEFENSE WITNESS.

Appellant contends the trial court abused its discretion by denying her request for a continuance to secure a material witness for the defense.

Palkowitz was arrested with appellant and was originally a codefendant in this case. She pled out early and was sent to prison. On the second day of trial appellant requested permission to address the court directly. Appellant explained she had just received a letter from someone indicating Palkowitz had informed this person she was willing to come to court and testify on appellant's behalf. Appellant told the court she wanted Palkowitz to be subpoenaed because she needed her as a witness. As appellant explained it, "[s]he is probably the only witness that I have."

Appellant's counsel interjected. Counsel informed the court several weeks before he located Palkowitz in prison and sent an investigator to interview her. The investigator made several attempts through the court liaison officer to speak with Palkowitz without success. The investigator also spoke to Palkowitz's prison counselor to confirm the counselor had in fact talked to Palkowitz about the investigator's desire to interview Palkowitz. Despite these efforts, Palkowitz did not respond. Counsel stated he then discussed with appellant the possibility of subpoenaing Palkowitz and the risks of doing so without first interviewing her. Because Palkowitz had not responded to previous requests for an interview counsel believed she did not want to testify and he did not want to subpoena her as a potentially uncooperative witness. The court agreed to make some inquiries to find out what it would take to bring Palkowitz to court.

After the lunch recess the court addressed the issue again. The court noted the prosecution case would soon conclude and the defense case would begin in a day or so. The court asked if appellant was requesting a continuance to locate and transport

Palkowitz from prison. Appellant replied "only if you think I really need her for a witness, but it is your call. Whatever you say I am going to go by." The court then called the bailiff to testify. The bailiff testified she made specific inquiries and was informed it would require an estimated two weeks to locate and transport Palkowitz to court.

The court noted no one knew whether Palkowitz's testimony would provide material assistance for the defense. The court expressed concern a two-week hiatus in the trial for Palkowitz's testimony might give the jurors a false sense of the witness's importance. The court observed it was appellant's personal request and not her counsel's request the witness be secured for trial. The court informed appellant it was usually counsel's decision how a case should be handled tactically. Ultimately, the court denied appellant's implied request for the two-week continuance to secure the witness's presence for trial as untimely.

A continuance of a criminal trial may only be granted on a showing of good cause.[7] Whether good cause has been shown rests in the sound discretion of the trial court.[8] The court's decision in ruling on a request to continue trial will not be overturned in the absence of a showing of abuse.[9]

A party who seeks a continuance to secure the attendance of a witness must show (1) she has exercised diligence to secure the witness's attendance; (2) the expected testimony by the witness is material and not cumulative; (3) the witness can be obtained

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[7] Section 1050, subdivision (e) ["Continuances shall be granted only upon a showing of good cause. Neither the convenience of the parties nor a stipulation of the parties is in and of itself good cause."].

[8] *People v. Beeler* (1995) 9 Cal.4th 953, 1003; *People v. Mickey* (1991) 54 Cal.3d 612, 660.

[9] *People v. Beeler, supra*, 9 Cal.4th 953, 1003; *People v. Rhines* (1982) 131 Cal.App.3d 498, 506.

within a reasonable time; and (4) the facts to which the witness will testify cannot otherwise be proven.[10]

Appellant cannot carry her burden of proving a continuance should have been ordered to secure Palkowitz as a witness. Our view of the matter might be different had the trial court denied the request for a continuance solely on the ground it was concerned the lengthy hiatus in the trial might give Palkowitz's testimony a false sense of importance, as appellant suggests. However, and as the record reflects, this was not the only ground articulated by the trial court or supporting the court's exercise of discretion in denying the request.

The entire trial did not even require four full court days. However, to secure the witness's appearance would require approximately two weeks and thus twice as much time as the entire trial consumed. Given these circumstances, it is apparent the witness could not be obtained to testify within a "reasonable time."

Most importantly, however, there was no evidence before the court regarding the materiality of the witness's testimony—or even its substance. It is true, Palkowitz would have been the only defense witness. However, that is not the same as saying she could testify to relevant facts that could not otherwise be proven through the testimony of others. And it is certainly not the same as saying she could testify to facts material to the defense case. Palkowitz had never been interviewed. It was thus impossible to know whether she could provide evidence not already presented through the detectives' and officers' testimony. Also, because she had never been interviewed, it was impossible to know whether Palkowitz had any information which differed in any respect to that already offered, and if so, whether any of it could be deemed material, as required for a continuance. Indeed, in the circumstances, it was even impossible to know whether the testimony she would provide would prove beneficial or detrimental to the defense. Significantly, appellant's counsel did not encourage, or join in, appellant's request to

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[10] *People v. Jenkins* (2000) 22 Cal.4th 900, 1037; *Owens v. Superior Court* (1980) 28 Cal.3d 238, 250-251.

secure Palkowitz as a witness, primarily because he had never had the chance to interview her.

Finally, the representation Palkowitz was even willing to be subpoenaed to testify came via a third party and not from Palkowitz herself. This made the offer to testify somewhat less compelling given her earlier lack of response to the defense investigator's several attempts to interview her about the case.

Given these overall circumstances, appellant has failed to carry her burden of proving her witness's testimony was not cumulative, was material, and could be secured in a reasonable time.[11] Accordingly, she has failed to demonstrate the trial court abused its discretion in failing to grant the two-week continuance to secure Palkowitz's trial testimony.

II. ERROR IN INSTRUCTING THE JURY REGARDING THE OFFENSE OF GIVING FALSE IDENTIFYING INFORMATION TO A PEACE OFFICER WAS HARMLESS.

Under section 148.9 it is a misdemeanor to falsely represent or identify oneself as another person or as a fictitious person to any peace officer whenever lawfully detained or arrested if done to evade the process of the court, or to evade the proper identification of the person by the investigating officer.[12]

The trial court's instruction to the jury on this offense was based largely on the statutory language. However, the court's written instructions were mistyped. The court read the instruction as mistyped and orally told the jury an element of the offense was the

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[11] *People v. Jenkins*, *supra*, 22 Cal.4th 900, 1037; *Owens v. Superior Court*, *supra*, 28 Cal.3d 238, 250-251.

[12] Section 148.9 provides in part:

"(a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . , upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor."

"person was *unlawfully* detained or arrested; . . . " rather than *lawfully* detained or arrested.[13]

The court also provided the jury with CALJIC No. 16.104 regarding definitions of lawful arrests.[14] In this instance the court's typed instructions were correct. However, in reading the instruction the court misspoke. When describing one type of *lawful* arrest the court instead stated, "A[n] *unlawful* arrest may be made by a peace officer without a warrant if the person arrested has in fact committed a felony although the commission was not in the presence of the officer."

Appellant contends the court's erroneous instructions inaccurately stated the law on this element of the offense and likely confused the jury. She claims the error was not harmless because the conflicting language probably caused the jury to focus their attention on this one element rather than on whether the evidence was sufficient to establish her motive in giving a false name satisfied the statutory criteria of attempting to

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[13] Special instruction A listed the elements of the misdemeanor offense as follows:

"Any person who falsely represents or identifies herself as another person or as a fictitious person to any peace officer upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a violation of Penal Code Section 148.9(a) a misdemeanor.

"In order to provide [sic] this crime, each of the following elements must be proved:

"1. A person falsely represented or identified herself to a peace officer;

"2. That person was *unlawfully* detained or arrested;

"3. That person did so to evade the process of the court or to evade the proper identification of the person by the investigating officer." (Italics added.)

[14] The court orally instructed the jury:

"A[n] *unlawful* arrest may be made by a peace officer without a warrant if the person arrested has in fact committed a felony although the commission was not in the presence of the officer.

"A *lawful* arrest may be made by a peace officer without a warrant whenever the officer has reasonable cause to believe that the person to be arrested has committed an infraction or a misdemeanor or a felony in his or her presence.

"A *lawful* arrest may be made by a peace officer without a warrant whenever the officer has reasonable cause to believe that the person arrested has committed a felony whether or not a felony has in fact been committed. . . . " (Italics added.)

evade the court's processes or of attempting to prevent identification by the arresting officer.

A trial court has a duty to provide correct instructions on all essential elements of a charged offense.[15] Instructional error omitting or misstating an element of an offense is subject to harmless error analysis under the harmless beyond a reasonable doubt standard.[16]

In this case the instructional error did not concern a technical legal term or a technical legal concept. If it had, the court's instructions would have required greater precision to ensure appropriate guidance for the jury.[17] The error in this case instead concerned an everyday lay term familiar to any English speaker. Using their common sense, as the court told them they should, the jurors probably identified the error as a mistake. Logic and/or common sense likely told the jurors the court misspoke when it referred to the phrase "unlawful arrest." Alternatively, the jurors could have thought the court simply misspoke as a result of the several obvious typos in the written instructions which they had in the deliberation room to review.

Given the obvious nature of the instructional error, and the fact most of the court's written and oral instructions correctly stated the law regarding lawful arrests, we find it improbable any reasonable juror could have been misled by the erroneous instructions on

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[15] *People v. Wickersham* (1982) 32 Cal.3d 307, 323 [the court's duty to instruct includes the duty to provide correct instructions on all essential elements of the charged offense]; *People v. Elam* (2001) 91 Cal.App.4th 298, 305-306 [same].

[16] *People v. Box* (2000) 23 Cal.4th 1153, 1212 [misreading instructions is at most harmless error when the written instructions received by the jury are correct]; *People v. Flood* (1998) 18 Cal.4th 470, 502-503 [instructional error improperly describing or omitting an element of an offense, like other trial errors, is subject to harmless error analysis under *Chapman*].

[17] See e.g., *People v. Estrada* (1995) 11 Cal.4th 568, 574 [a word or phrase has a technical, legal meaning that requires clarification only if it "has a definition that differs from its nonlegal meaning."].

this element of the offense. Accordingly, we conclude the error in this case was harmless beyond a reasonable doubt.[18]

III. THE COURT ERRED IN ORDERING REIMBURSEMENT OF ATTORNEY FEES WITHOUT COMPLYING WITH THE PROCEDURAL SAFEGUARDS OF SECTION 987.8.

At the sentencing hearing the court imposed a sentence of 10 years in state prison. The court also imposed various fines and made other orders. In one of the orders the court directed, "You must pay attorney fees in the amount of $6,856.45 pursuant to 987.8. [¶] If you believe you do not have the financial ability to pay those attorney's fees, you have a right to see the financial evaluator who will work with you in determining whether you have [the] ability to pay for all or any part of that."

Appellant argues the court's order directing her to pay $6,856.45 in attorney fees should be vacated because it was not imposed consistent with the due process requirements of section 987.8. Contrary to the statutory directive, she notes, the court imposed the order without any prior notice she may be responsible to pay attorney fees, without a hearing, without findings on her current ability to pay any amount in fees, and without any evidence presented on the actual costs of her legal representation.

The People agree the court's order imposed without an affirmative showing of appellant's ability to pay was erroneous. They further agree the order should be vacated and the cause remanded for a proper hearing consistent with the requirements of section 987.8.

"[P]roceedings to assess attorney's fees against a criminal defendant involve the taking of property, and therefore require due process of law, including notice and a hearing."[19] In California, the statutory procedure for determining a criminal defendant's

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[18] *Chapman v. California* (1967) 386 U.S. 18, 24.

[19] *People v. Poindexter* (1989) 210 Cal.App.3d 803, 809, citing *People v. Amor* (1974) 12 Cal.3d 20, 29-30.

ability to reimburse the county for the services of court-appointed counsel is set forth in section 987.8.[20] Under the statute, a court may order a defendant, who has the ability to pay, to reimburse the county for the costs of legal representation. However, the defendant must be given notice and afforded specific procedural rights, including the right to a hearing, to present witnesses at the hearing and to confront and cross-examine adverse witnesses.[21]

Moreover, a criminal defendant must be informed of her potential obligation to reimburse the county for costs of legal representation before counsel is even appointed.[22] At the conclusion of the trial the court may, after notice and a hearing, make a determination of the defendant's ability to pay all or a portion of the actual costs of her

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[20] Section 987.8 subdivision (b) provides: "In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, *after notice and a hearing*, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided." (Italics added.)

[21] Section 987.8, subdivision (e) provides in pertinent part: "At a hearing, the defendant shall be entitled to, but shall not be limited to, all of the following rights:

"(1) The right to be heard in person.

"(2) The right to present witnesses and other documentary evidence.

"(3) The right to confront and cross-examine adverse witnesses.

"(4) The right to have the evidence against him or her disclosed to him or her.

"(5) The right to a written statement of the findings of the court." (See also, *People v. Amor, supra*, 12 Cal.3d 20, 30 [the due process requirements of notice and a hearing are part of the statute, as are the rights to discovery, confrontation, cross-examination and other procedural devices].

[22] Section 987.8, subdivision (f) specifies: "*Prior to the furnishing of counsel* or legal assistance by the court, *the court shall give notice to the defendant* that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of counsel. The court shall also give notice that, if the court determines that the defendant has the present ability, the court shall order him or her to pay all or a part of the cost. . . ." (Italics added.)

legal representation.[23] The court may also hold a second hearing within six months of the conclusion of the criminal proceedings to determine whether changed circumstances have affected a defendant's ability to reimburse the cost of the legal assistance provided.[24]

Under the statutory scheme there is a presumption a defendant sentenced to prison does not have the ability to reimburse defense costs. However, this presumption may be overcome by proof of unusual circumstances.[25]

The record in the present case is utterly devoid of any evidence of notice, of a hearing, of the actual costs of appellant's defense or of any consideration of appellant's ability to pay any amount toward the costs of her legal representation.

There is nothing in the record of her arraignment to indicate appellant received prior notice she might be required to reimburse the county for the costs of legal representation as required by section 987.8, subdivision (f).

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[23] Section 987.8, subdivision (b); *People v. Poindexter, supra,* 210 Cal.App.3d 803, 811 ["The court must review evidence of the actual costs to the county before it can assess costs or attorney's fees to the defendant. (Citation.)"]; *People v. Cruz* (1989) 209 Cal.App.3d 560, 566 ["the word 'cost' as used in section 987.8 means the cost of the legal services provided to a criminal defendant as represented by a pro rata share of the public defender's budget. In addition, 'cost' includes any proven expenses to the county established by the evidence, such as investigator's fees and expenses, expert witness fees or expenses, long distance telephone expenses, etc."]; *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217 ["The order here is entirely unsupported by evidence that the amount requested by the public defender, and allowed without opposition, represents the actual costs to the county of the services provided to defendant."].

[24] Section 987.8, subdivision (b); see, *People v. Flores* (2003) 30 Cal.4th 1059, 1066 ["The provision for holding a second hearing, six months after the conclusion of criminal proceedings, was intended to permit the trial court to take such changed circumstances into consideration."].

[25] Section 987.8, subdivision (g)(2)(B) provides when determining a defendant's "ability to pay" the court should consider "[t]he defendant's reasonably discernible future financial position. In no event shall the court consider a period of more than six months from the date of the hearing for purposes of determining the defendant's reasonably discernible future financial position. *Unless the court finds unusual circumstances, a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense*." Italics added.

There is similarly nothing in the report prepared by the probation officer to indicate appellant was forewarned, or aware of, the possibility she may be ordered to reimburse the costs of her legal representation.[26] If anything, the information contained in the probation report suggests appellant did not have the present ability to pay any amount toward her legal costs. The reports notes, and the evidence showed, when arrested appellant had $205 on her person. However, this was likely the proceeds of her illicit drug sales. The probation officer reported appellant was a "transient" and "unemployed" and had a lengthy history of arrests and convictions. This information suggested appellant had no consistent source of income sufficient to pay any amount in fees. Also, because appellant was sentenced to 10 years in state prison, there is a statutory presumption she will not have "a reasonably discernible financial ability to reimburse the costs" of her defense.[27] As noted, there is no evidence in the record of appellant's present ability to pay, let alone of unusual circumstances to overcome the presumption of her inability to pay.

The record shows the court did not conduct an on-the-record hearing to determine appellant's ability to pay. Nor is there any evidence whatever to substantiate the amount imposed was in fact the cost of her legal representation. In short, there is nothing in the record to show any attempt to comply with any of the requirements of section 987.8. Accordingly, the order must be vacated and the cause remanded for further proceedings consistent with section 987.8.

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[26] Compare *People v. Phillips* (1994) 25 Cal.App.4th 62, 74-75 [the probation officer's report included attorney fees in its recommendation for issues to be considered at the sentencing hearing, thus placing the defendant on notice he may be assessed the cost of his legal representation].

[27] Section 987.8, subdivision (g)(2)(B).

DISPOSITION

The order requiring appellant to pay attorney fees in the amount of $6,856.45 pursuant to section 987.8 is vacated and the cause is remanded to the trial court for further consideration consistent with the requirements of section 987.8. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.